

TAB 16

**THIS IS EXHIBIT "16" REFERRED
TO IN THE AFFIDAVIT OF
E. BRUCE LEONARD, SWORN
BEFORE ME THIS 13TH DAY OF
OCTOBER, 2006.**



A COMMISSIONER, ETC.



CASSELS BROCK
LAWYERS

October 3, 2006

BY FACSIMILE

Peter F.C. Howard
Stikeman Elliott LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay St.
Toronto, ON M5L 1B9

bburden@casselsbrock.com
tel 416.869.5963
fax 416.640.3019
file # 20944-5

Dear Mr. Howard:

Re: Heico Purchase of Ivaco Business

I am writing in response to your letter dated September 28, 2006 and further to Heico's motion record that was served on September 29, 2006.

I have carefully reviewed the comments made in your letter. Although I would not normally argue Heico's case with you by way of correspondence, I thought that it might be helpful in this case for you to understand the positions that Heico will advance, as well as some of the law on which Heico will rely.

In order to succeed on its motion respecting privilege, the Monitor has several significant hurdles to overcome.

Status to Assert Ivaco's Privilege

First, the Monitor would have to satisfy the court that it has standing to assert the privilege of Ivaco to the documents. The December 2004 court order does not give the Monitor such power, whether explicitly or impliedly. As such, the court would have to resolve the matter based on case law. We are not aware of any situation where a court has actually considered and ruled upon whether a Monitor can assert privilege of the debtor. In fact, in analogous situations, no such right has been accorded to representatives of the insolvent party. For example, *Bre-X Minerals Ltd. (Trustee of) vs. Verchere*, [2001] A.J. No. 1264 (C.A.) holds that the debtor's rights relating to privilege do not pass to a bankruptcy trustee and thus privilege cannot be waived by such trustee. The New Brunswick Court of Queens Bench came to the same conclusion in *Re Saint Anne-Nackawic Pulp Co.*, 12 C.B.R. (5th) 65 (Q.B.) at paragraph 8.



Does Privilege Exist?

Even if the Monitor is found to have standing, it is far from clear that privilege still exists over any documents or that the Monitor has any right to shield relevant documents.

First, the court would undoubtedly recognize that the Monitor is an officer of the court that is required to be impartial and even-handed. To the extent that the allegedly privileged documents are relevant and helpful to resolving matters in the insolvency proceeding, the court could well conclude that suppressing documents based on privilege would be contrary to the general duties and responsibilities of such an officer of the court (e.g. a Monitor or trustee) and unfair to the interests of stakeholders. (See *Re Beetown Honey Products Inc.* (2003), 67 O.R. (3d) 511 (S.C.) at paragraphs 20 and 21, aff'd 3 C.B.R. (5th) 204 (C.A.)).

Second, this is simply not a case of inadvertent disclosure of privileged documents. Both Ivaco and the numbered company which provided services to Ivaco during the restructuring were obviously aware that correspondence to and from Ivaco's counsel was kept in Ivaco's corporate office. These parties consciously and deliberately turned over such documents to Heico as part of the overall books and records of Ivaco that were delivered on closing. Ivaco had full opportunity to remove any documents that it did not want to fall into the hands of Heico, but chose not to do so. As such, privilege was waived.

The documents were not maintained in a manner consistent with any desire by Ivaco to preserve their confidentiality. As such, the documents would no longer be protected by privilege. (See *In Re Grand Jury Subpoenas* 734 F. Supp. 1207 at 1213 (E.D. Va. 1990)). See also *Robbins & Myers, Inc. v. J.M. Huber Corp.*, 2003 U.S. Dist. LEXIS 10001 at page 16 of 26 (W.D.N.Y. 2003).

Third, even if Justice Ground determines that privilege was not waived, he will still have to review each one of the documents in issue in order to determine whether privilege ever applied. Since the Monitor appears to be relying upon solicitor-client-privilege, the Monitor will have to demonstrate that the specified documents constitute communications for the purpose of obtaining legal advice. Correspondence between a client and its solicitors is not automatically privileged. To the extent that the documents do not reflect the seeking or receiving of legal advice, they are not, and have never been, privileged.

Fourth, if any of the documents was sent or copied to third parties such as the Monitor or its counsel, no privilege would ever have attached to such documents.

Applicable Law

Finally, it is far from clear that the law of Ontario applies to the issue of privilege. After



all, Ivaco was a Quebec company and would, therefore, have sought and obtained legal advice from its headquarters in Quebec. Further, to the extent that the Monitor wishes to make any allegations against McDermott Will & Emery or the Heico parent company, both of which are located in Illinois, the laws of privilege of that jurisdiction will come into play.

If foreign law is involved, the Monitor will have to prove foreign law by way of expert evidence.

Next Steps

Since it was not my intention to provide you with a full factum-length letter, I will not trouble you with the additional legal authorities that we have uncovered. Suffice it to say that the issue of privilege, which is one among several issues to be dealt with on November 7, will undoubtedly consume substantial time and effort of the parties and may well delay the completion of the working capital process, particularly if the unsuccessful party appeals the decision of Justice Ground to the Court of Appeal or even beyond.

We are certainly prepared to fully argue the issue of privilege and also whether any law firm should be removed from the record. Unfortunately, however, the affidavit evidence that you provided on September 29 is not sufficient for us to respond substantively to the claims of privilege. For example, although your firm has obviously reviewed the bundle of documents that we sent over on September 13, 2006, we still do not have information from you about:

- (a) the date, type, author, recipient (including copies and blindcopies), and subject matter of each document;
- (b) particulars of which specific documents are allegedly privileged; or
- (c) the specific basis for the claim of privilege.

Obviously, if this information is not forthcoming, we cannot respond to the privilege motion. As such, it may be necessary to set up an appointment with Justice Ground in the next few days to obtain further directions so that Heico can properly respond.

Since it is not our intention to pick a fight where there is none or to unnecessarily delay matters, we believe that it would be useful to speak with you further in an attempt to better define, and perhaps resolve, some or all of the privilege issues. We believe that was the intent of your September 28 letter.

Now that you have had a chance to reflect on the draft Statement of Claim of Heico and to review the other items in Heico's motion record, we think that such discussion could



Page 4

well be productive. As such, we ask that you give us a call at your earliest convenience to discuss matters.

We look forward to hearing from you.

Yours truly,

WJ Burden per JNB

William J. Burden

WJB:ph